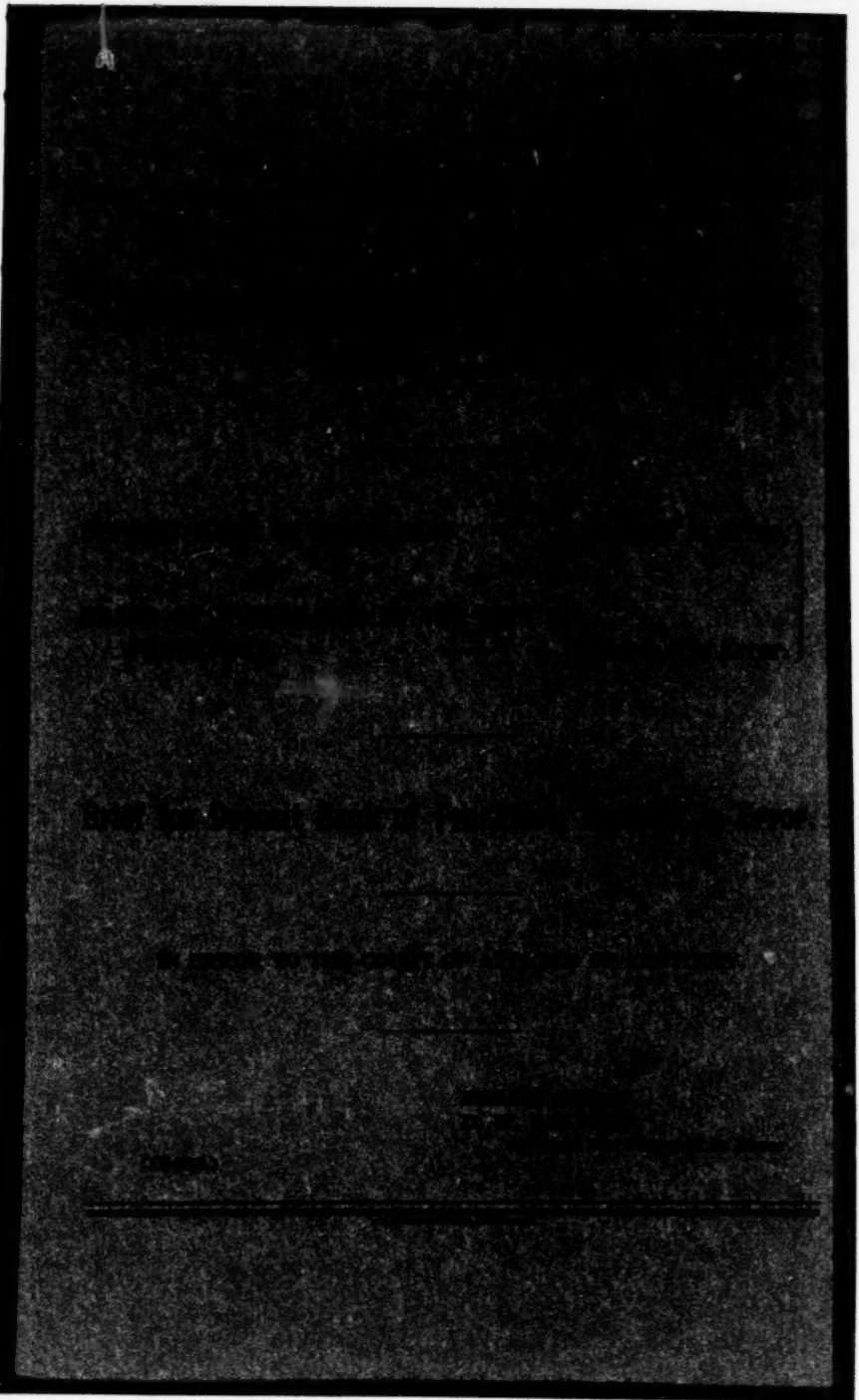


POINTS ARGUED AND AUTHORITIES.

1st. The decree of the U. S. Court relied on as a bar to this action having been rendered by a court having jurisdiction of the cause and of the parties, is conclusive upon the city in every other Court so long as that decree stands unreversed.

Hollister vs. Abbott, 64 Am. Dec., 342, and cases cited.
Dupuy vs. Johnson, 4 Bibb, 562.
Garner's Adm'r vs. Strode, 5 Litt. 314.
Paul vs. Smith, etc., 82 Ky. 431.
Davis vs. McCorkle, 14 Bush, 751.

2d. And the fact that this action was begun before that in which the United States Court suit was filed does not alter the rule.

Amer. and Eng. Encycl. of Law. volume 12, page 149c, and cases there cited.

3d. The Court of Appeals was without jurisdiction to decide whether or not the United States Court based its judgment upon one or all of the pleas of *res judicata* set up and relied on by the bank in that case, the rule being well settled that "as between National and State Courts, neither will undertake to grant relief from a judgment rendered by the other. One having equitable grounds for relief from a judgment rendered in Courts of either must apply to the Court of the sovereignty in which the judgment was rendered.

Freeman on Judgments, section 485, page 852.
Citing Riggs vs. Johnson & Co., 6 Wall. 166.
U. S. vs. Keokuk, 6 Wall. 514.
Engles vs. Miller, 2 Rich. Eq. 320.
Strozen vs. Hawes, 30 Ga. 578.
1 U. S. Stats. at Large, 335.

The Federal question is, that the rights and immunities which the Deposit Bank acquired under the decree of June, 1898, affirmed by this Court, have been denied and disregarded by the State Court by the judgment in error, in violation of section 709, Revised Statutes of the United States.

Foster's Fed. P. & P., volume 2, page 1180, note 1.
Citing Tex. & Pac. R. Co. vs. Johnson, 151 U. S. 81-99.
Citing U. S. Rev. Stat., section 709; 172 U. S. 493.
Dowell vs. Appellate, 152 U. S. 327.

Supreme Court of the United States.

DEPOSIT BANK OF FRANKFORT, – – *Plaintiff in Error,*

vs.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT,
Defendant in Error.

BRIEF FOR DEPOSIT BANK OF FRANKFORT, PLAINTIFF IN ERROR.

This writ of error is brought to reverse the judgment of the Kentucky Court of Appeals, upon the ground of that court's refusal to give effect to the judgment of this court when pleaded as an estoppel in a suit in that court between the same parties and upon the same subject-matter, upon the ground of newly-discovered evidence presented to the State court since the judgment of this court was rendered. A decree was rendered by the Circuit Court of the United States, the opinion being delivered by Judge Taft, June 25th, 1898, in an injunction suit by the Deposit Bank of Frankfort, plaintiff in error, against the City of Frankfort, defendant in error, in which the contract of the bank under what is known as the Hewitt law was upheld upon the ground of *res judicata*, and the act of 1892, imposing taxes on the bank, was held to be in contravention of the Constitution of the United States. That decree was appealed to this court, where it was affirmed in 1900. That decree was pleaded by the bank in bar of an action in the State Court by the City

against the bank for taxes under the act of 1892, and the Court of Appeals held that the city was not estopped by it. This is a brief statement of the case made on this writ of error, but there have been so many different suits between these parties and so many different judgments are presented in the record, that we beg the indulgence of the court to a statement of these suits, and of the different proceedings in the different courts, in order that the court may see clearly the circumstances under which the judgment in error was rendered.

This statement is made all the more necessary by the fact that several different suits were heard with this bank's suit, and the judgment in those cases appear in this record though they have no bearing on the question now before the court.

In August, 1894, the city filed this petition in equity in the Franklin Circuit Court against the Deposit Bank of Frankfort, plaintiff in error, to recover taxes for the years 1892-3-4 with, penalties. It was alleged in the petition that the assessments for those taxes had been placed in the hands of the tax collector for collection, and by him returned no property found.

To this petition the bank filed a demurrer, which was sustained as to the tax for 1892 and the penalties, and overruled as to the taxes for 1893 and 1894. (R. 6.)

The bank then, on September 27th, 1894, filed its answer in two paragraphs, in the first of which it denied any indebtedness whatever to the city for taxes, denied the alleged assessment and the return of no property found, and in the second paragraph it set out and relied upon its contract with the Commonwealth under the Hewitt law as exemption from all taxation by the city, and alleged that the act of 1892, under which the taxes were claimed, was in contravention of

section 10, article 1 of the Constitution of the United States, and asked that the city be enjoined from attempting to assess or collect any taxes against the property or franchise of the bank. (R. 4 to 11.) At the previous term of the Franklin Circuit Court judgments had been rendered in favor of the city and county, in two suits, which had been brought against them by the Bank of Kentucky and Farmers Bank, to enjoin the collection of taxes asserted against those banks, upon the exact ground stated in second paragraph of the answer of the Deposit Bank, above described, which was in substance that those banks had a contract with the State under the Hewitt law by which the banks were exempted from payment of city or county taxes. At the same term two suits between the Deposit Bank and the county in regard to the bank's liability for county taxes, by reason of its contract under the Hewitt law, had been decided in favor of the county and against the bank. All these decisions were based upon the repeal of that law by the act of 1892, and the banks had taken appeals to the Court of Appeals, which were then pending. And as the validity of the Hewitt law was the real question involved in the cases appealed, in suits of the same nature as this suit, and the same attorneys represented both the county and city in each of the suits against the banks, the counsel for the city and the bank thought it unnecessary to prosecute this suit further, and they made an agreement, which was afterwards recited in the judgment rendered in conformity to it, which agreement was—

> "That this action should stand upon the answer filed by the defendant until the decision by the Court of Appeals in the two cases appealed from this Court, in one of which the defendant bank was plaintiff and the County of Franklin, etc., were defendants, and in

the other the Commonwealth, for the use of the County, was plaintiff, and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the Court of Appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases."
(See judgment, R. 2.)

This agreement was perfectly fair to both sides, as any action taken by the Court of Appeals in the other cases mentioned would also be taken in this case, and as there were already pending in that court about one dozen cases from other courts upon exactly the same question (the validity of the Hewitt law), it was manifestly for the interest of both parties that they should get the full benefit of that appeal as provided in the agreement, without the additional labor and costs of it. And the agreement was kept in good faith, neither side taking any step in the case until February 1, 1896, when the following judgment was rendered in it (R. 2):

"JUDGMENT.

"FRANKLIN CIRCUIT COURT.

"Filed February 1st, 1896.

"BOARD OF COUNCILMEN, CITY OF FRANKFORT . . . . . *Plaintiff.*	
"VS.	Judgment.
"DEPOSIT BANK OF FRANKFORT . . . . . *Defendant.*	

"It appearing to the court that this action has been continued and not herefofore submitted, by agreement between the plaintiff and defendant, by their respective

attorneys, that this action should stand upon the answer filed by the defendant until the decision by the Court of Appeals in the two cases appealed from this court, in one of which the defendant bank was plaintiff and the county of Franklin, etc., were defendants, and in the other the Commonwealth, for the use of said county, was plaintiff, and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the Court of Appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases, and it further appearing to the court by the mandates and opinions of the Court of Appeals filed in said two cases, that the Court of Appeals has sustained the defense set up and relied on by the bank in said two cases, based upon the contract made by the bank under the Hewitt bill, which is the same contract relied on as a defense in this case, it is now ordered and adjudged that Art. 2 of the Act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky, approved May 17, 1886 (Gen. Statutes, chap. 92, art. 2), and the acceptance of the provisions thereof by defendant, constituted a contract between the defendant and the Commonwealth which the latter can not alter or change without the consent of the former; by the terms of which contract the defendant can not, during the continuance of its charter, be assessed for taxation, or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assesesd for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present Constitution of this State and

of the act of Nov. 11, 1892 (art. 3, chap. 103, Acts 1891-2-'3), in so far as they are intended to provide for any assessment or taxation of the defendant's property, right of property or franchise except its said real estate, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of Nov. 11, 1892, had and has no authority in law to assess or value the defendant's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county or municipal taxation; that the temporary injunction which was prayed for in this cause at the commencement of the action be, and the same is now hereby, granted, and the defendants and each of them are perpetually enjoined and restrained from levying upon or selling any property of the defendant for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the defendant, except upon its real estate, and it is further adjudged that the defendant recover of the plaintiff its cost in this action expended. To all of which the board of councilmen of the city of Frankfort except and pray an appeal to the Court of Appeals, which is granted."

And notwithstanding the highest court in the State had, after the fullest argument, declared, in the opinion delivered by Judge Pryor, in June, 1895, that the act of 1892 did not repeal this bank's contract, the city on November 14, 1895, filed a suit in the Franklin Circuit Court against the State Board of Valuation and Asessment and this bank, the Bank of Kentucky and Farmers Bank, to compel that board to assess the franchises of those banks for city taxation for the year 1895. The three banks filed answers to that suit at

the January term, 1896, in which they set out their contract, and also the judgments upholding it, and pleaded the same as *res judicata*. No other steps were taken in that suit except that the city, by amended petitions filed during each of the years 1896, 1897, 1898 and 1899, asked that the board be compelled by mandamus to certify the franchises of the banks for those years, the amended petitions for 1898 and 1899 being both filed after the judgment of Judge Taft, hereinafter set out, had been rendered.

On May 12, 1897, this bank, together with the Bank of Kentucky and the Farmers Bank, filed its bill in the Circuit Court of the United States against the State Board of Valuation and Assessment, the County of Franklin and the City of Frankfort, in which it alleged the facts hereinbefore set out, concerning the attempts made by the city and county to collect taxes from it; and further alleged that, continuously since its organization in 1867 it had regularly paid taxes to the State upon all its property, and that the same had been accepted as in full of all other taxes against it, by express provisions of its charter, and also of the general laws then in force, and it further alleged that by the settled course of the decisions of the Court of Appeals in Kentucky the provisions of the bank's charter exempting it from all other taxation, by the payment of more taxes to the State than was exacted from other kinds of property, had been upheld. (R. 39.)

And several different suits were set up and relied on as *res judicata* of that question, and copies of the records in all of those cases were filed as exhibits with the bill. The prayer of that bill is as follows:

> "The premises considered, the complainant prays that the said Samuel H. Stone, Charles Finley and

George W. Long be perpetually enjoined and restrained from assessing the value of the complainant's capital stock under the said act of November 11, 1892, for the years 1894, 1895, 1896 and 1897, or any other year, and that the said defendant, Samuel H. Stone, be enjoined from certifying any such valuation to the said county and board of councilmen, and that the said county and Board of Councilmen of the City of Frankfort be enjoined and restrained from endeavoring to collect any tax upon any such valuation; that the complainant's contract be fully established; that it be declared that upon conforming to its said contract as hereinbefore set up, by making the payments under the Hewitt law, no other or further tax shall be exacted from it under any form or by any authority."

The City, County and State board made various defenses in this bill; denied that the bank was protected by the judgments relied on as *res judicata*, and alleged that the Hewitt contract had been repealed by the act of 1892. The case of this bank and of the other two Frankfort banks, in all of which the question as to validity of the Hewitt contract, and of the pleas of *res judicata*, were in issue, were heard by Circuit Justice Harlan and Circuit Judges Taft and Lurton, at Nashville, in connection with a number of tax cases from Louisville, on May 28, 1897, upon the answer of the county and city and the pleas filed. The city being advised by that trial that the judgment of February 1, 1896, was being relied on by the bank as *res judicata*, in order to destroy its effect, sued out an appeal from that judgment in the Court of Appeals, on January 14, 1898, having abandoned the appeal granted in the Circuit Court. On June 25, 1898, the decree in the suit in the United States Circuit Court was

rendered in which the contention of this bank was fully upheld, its contract under the Hewitt law established in the very terms of the prayer of the bill, which decree is as follows:

"DECREE.

"DEPOSIT BANK OF FRANKFORT,

"vs.

"SAMUEL H. STONE, *et al.*

"The court being sufficiently advised, files its opinion herein.

"It is therefore adjudged, ordered and decreed as follows:

"First. That the demurrer of the defendants, Board of Councilmen of the City of Frankfort and Franklin county, and of the defendants, Samuel H. Stone, G. W. Long, and Charles Finley, be, and the said demurrers are, hereby overruled; to which the said defendants each except.

"Second. The plea of defendants, Board of Councilmen of the City of Frankfort and Franklin county, to the bill of complaint is overruled; to which the said defendants except.

"Third. Thereupon came the complainant, by Frank Chinn, its counsel, and files its replication to the answer of the defendants, Board of Councilmen of the City of Frankfort and Franklin county.

"The defendants, county of Franklin and City of Frankfort, offered to file an amended answer, to which

complainant objected, and the motion to file is overruled; to which said defendants except, and said amended answer is made a part of the record by the order.

"And by consent this cause came on to be heard for final decree. The complainant read upon hearing its bill of complaint and its amended bill of complaint herein, together with all the exhibits filed with said bills, to-wit:

"Exhibit 'A,' being the record of the proceedings in the case of Deposit Bank of Franklin against Franklin county and John W. Gaines, sheriff.

"Exhibit 'B,' being the records in the proceedings in the case of Deposit Bank of Frankfort against Franklin county and R. D. Armstrong, sheriff.

"Exhibit 'C,' being judgment of Franklin Circuit Court, entered February 1, 1896, in the suit of Deposit Bank of Frankfort against Franklin County.

"Exhibit 'D,' being record of the proceedings in the case of Board of Councilmen of the city of Frankfort against Deposit Bank of Frankfort.

"The defendant, the county of Franklin, read on the hearing its answer, and the defendant, Board of Councilmen of the City of Frankfort, read on the hearing the record of the proceedings in the case of Board of Councilmen of City of Frankfort against L. C. Norman, auditor, etc., and also read its answer.

"And it is now adjudged, ordered, and decreed that the defendants, Samuel H. Stone, Charles Finley and George W. Long, be, and they are hereby, perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the act of November 11, 1892, for the years 1895, 1896, 1897, 1898, or for any other subsequent years until the expiration of the charter of the complainant, and are enjoined and restrained from

certifying such value to the county clerk of Franklin county or to any officer of the Board of Councilmen of the City of Frankfort or the County of Franklin; and the defendants, county of Franklin and Board of Councilmen of the City of Frankfort, are enjoined and restrained from endeavoring to collect any tax upon any such valuations; *and the complainant, by making payments in accordance with the Hewitt law, is discharged in full from all taxes to be exacted from it under any form or by any authority.*

"*It is further adjudged, ordered and decreed that by reason of the several pleas of res judicata, relied on by the complainant in its bill and as shown by the exhibits therein, the complainant has established a contract with the Commonwealth of Kentucky under the provisions of article 2 of the act of the General Assembly of the State of Kentucky, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1896, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth can not alter or change without the consent of the camplainant; that by the terms of this contract the complainant and its shares of stock can not, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide, or do provide, for any assessment or taxation of the complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by sections*

1, 2 and 3 of article 2 of the said act approved May 17, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

"And it is further adjudged that the complainant recover of the defendant its costs in this action expended.

"And came defendants and prayed an appeal in open court and tendered their assignment of errors; whereupon the court allowed the appeal, and orders the assignment of errors to be filed and fixes the appeal bond at one thousand dollars.

"June 25, 1898.

(Signed) "WM. H. TAFT,
"*Circuit Judge.*"

(The italics are ours.)

An appeal was prosecuted to this court from that decree, and it was affirmed (174 U. S. 412). The city filed a petition for rehearing, which was overruled.

It will be seen from these proceedings that the city had the fullest possible hearing in the courts upon every question at issue between it and the bank, including the validity of the agreement recited in the judgment of February 1, 1896, which was put in issue at every step of the suit, all of which have been decided adversely to it, and the discharge of the bank from all taxation by the city except alone tax on any real estate owned by it, fully and clearly established by the decree.

The counsel for the city having thus exhausted all means of compelling payment of taxes by these banks through the instrumentality of the courts,next resorted to the legislature and caused the charters of these three banks to be repealed

by the act of March 22, 1900, which is copied in the appendix to this brief.

In the meantime the appeal from the judgment of February 1, 1896, which had been allowed to drag along on the docket of the Court of Appeals, came on to be heard, and was reversed by the opinion of Judge Hazelrigg (R. 14) upon the ground that the agreement therein stated should have been set up by a pleading. The bank then filed a petition for rehearing (R. 16), in response to which, by Judge Hobson (R. 18), it was held that the attorneys for the city had no authority to make such an agreement. (R. 20.)

Notwithstanding the proceedings in this court had so effectually destroyed the foundation of the city's claim to tax this bank, and notwithstanding the repeal of its charter by the legislature, the city served notice December 20, 1900, on the former president of the bank that it had filed in the clerk's office of the Franklin Circuit Court the mandate of the Court of Appeals, reversing the judgment of February 1, 1896. The president filed his affidavit January 17, 1901, in which he set out the repeal, and stated that he was not president when the notice was served on him, and at the same time entered his special appearance, to suggest the repeal of the charter. (R. 23.)

No action was taken upon the question of the repeal, and the bank filed a supplemental answer (R. 24) in which it set out the facts in regard to the pendency in that court of the mandamus case above referred to, and the filing of its bill in the Circuit Court of the United States against the city and county, and all the proceedings therein, including the decree of Judge Taft and the affirmance of it by this court, and pleaded and relied upon said decree in bar of any recovery by the city in that action. To this supplemental answer the bank filed a reply (R. 27) in which it averred that the Federal

court judgment was based solely upon the judgment of February 1, 1896, which had been reversed by the Court of Appeals, and was therefore inoperative, and in addition, that the Federal court judgment was only for the taxes of the years 1895 and subsequent years, and therefore presented no obstacle to its recovery of taxes for the prior years 1893 and 1894. Both these averments were denied by the rejoinder of the bank. (R. 27.) The bank relied upon both defenses set up in the answer and supplemental answer; insisted that the State court had no authority to examine into the grounds upon which the Federal court had based its judgment, and that that judgment was conclusive, and could not be questioned in a collateral proceeding.

With the record in this condition the case was submitted to Special Judge Edelen, who rendered a judgment, February 2, 1901, dismissing the city's petition, upon the ground that it had failed to prove that the tax books had been returned "no property found," which fact had been alleged by the city and denied by the bank and that the city could not maintain the action without such return, by the express terms of the statute. (See judgment R. 33.)

From that judgment the city took an appeal to the Court of Appeals, which reversed it, by the judgment now before this court on writ of error. (R. 170.)

The errors relied on to reverse that judgment are set out at length in the assignment of error (R. 184), but may be briefly stated as follows:

(1) That the Court of Appeals erred in deciding that article 2 of the act of May, 1886 (the Hewitt law), did not constitute an irrevocable contract between the bank and the State of Kentucky;

(2) That the provisions of the Constitution of Kentucky and of article 3 of the act of 1892, as applied to this bank, did

not impair the obligation of that contract contrary to the provisions of the Constitution of the United States;

(3) And in refusing to hold and decide that the judgment of the United States Circuit Court, affirmed by this court, was *res judicata* of the question of this bank's liability for the taxes for 1893 and 1894 sued for.

Thus it appears that the Court of Appeals, by the majority opinion delivered by Judge Paynter, after reciting that "all questions are eliminated from the case, except the question as to whether the right to recover the taxes for the years in question is barred by a judgment of the Federal court," decides that question in the negative, upon two distinct grounds, namely (1) that the judgment of this court was based on a judgment of the Franklin Circuit Court, as *res judicata*, which judgment had since been reversed by the Court of Appeals, and "the foundation upon which the Federal court's judgment was based has been swept away by the opinion of the Court of Appeals," and (2) that the judgment of this court if otherwise valid, would not be a bar to recovery by the city for taxes for any other years than those in controversy in that suit.

Upon the last-named ground we do not think it necessary to do more than call the court's attention to the fact that it was one of the grounds relied on by the city in the former suit in this court to defeat the operation of the plea of *res judicata*, and in the opinion of Judge Taft, was decided against the city, upon the authority of New Orleans vs. Citizens Bank, 167 U. S. 371 (R. 115), and is therefore *res judicata* as to this case, and is stated in that opinion to be "the elemental rule, stated in text-books and enforced by many decisions of this court." That the majority of the Court of Appeals announced this as one of the grounds of reversal is only one of the many instances in which that majority have,

by their opinion in this case, disregarded that "elemental rule" and all those "decisions of this court."

That reversal was made upon the ground, as stated in the majority opinion delivered by Judge Paynter, that although this court held that this bank had "no contract rights with the State which relieved it from the payment of taxes to the city, yet because of the judgment of February 1, 1896, the city was barred from recovering the taxes for the years 1895-6-7-8." The opinion then proceeds.

> "So we have this anomalous condition, the Supreme Court of the United States holding in the case mentioned that the appellee had no contract rights which gave it immunity from taxation of the City of Frankfort, but that it was protected against the enforcement of the taxes for the years stated by reason of the unreversed judgment to which we have alluded. The same effect must be given to the judgment of a Federal court as an estoppel as if it were the judgment of a State court. That judgment having been reversed, the foundation upon which the Federal court's judgment was based has been swept away by the opinion of this court. Had it been reversed previous to the judgment of the Federal court, then of course that court would not have held the city was estopped by the judgment from asserting its claim for the taxes for the years there in controversy."

Until that statement was made in the opinion we had not thought it was possible for any court to sweep away the foundation upon which this court had rendered a judgment, or that any other court would be heard to say what this court would have decided upon a different record from that presented to it.

It is worthy of note that the statement is three times repeated in the opinion that this court, held in the former suit, that although this bank had no contract under the Hewitt law, yet exempted it from payment of city taxes solely on account of the judgment of February 1, 1856.

Our answer to all this is, that if these statements of the facts were correct the conclusion reached is erroneous, because that court is without authority to reverse the judgment of this court and to say what it would have decided upon a different state of facts. But we challenge the correctness of the facts stated in that opinion. This court did not hold that this bank did not have a valid contract under the Hewitt law, and the best evidence on that point is the decree itself, which we have quoted above.

That decree itself states that it was rendered not upon an "unreversed judgment of the Franklin Circuit Court," as the majority opinion recites, but "by reason *of the several pleas of res adjudicata, relied on by the complainant in its bill and as shown by the exhibits filed therewith, the complainant has established a contract*," etc.

But it is insisted that because only one judgment was mentioned by the court in the brief opinion rendered in the case of this bank (R. 156), there was no other ground for it, although the opinion referred in express terms to the opinion in the Bank of Kentucky case, where all the questions raised were disposed of with that care and ability for which Judge Taft is so distinguished.

It is well settled though, that—

> "The effect of a judgment as *res judicata* is not limited nor enlarged by the reasons given by the court for its rendition, nor by the failure of the court to give its reasons in writing on every point when required to do so by the Constitution of the State."
>
> Freeman on Judgments, volume 1, page 443.

That is the rule where the judgment or decree is silent as to the ground upon which it is given, with how much greater force, then, would it apply to a case like this, where the reasons are stated in detail in the decree.

But suppose it were admitted that Judge Taft was mistaken in saying, as he did in the decree, that the city was estopped by "several pleas of *res adjudicata*," because, to the mind of the majority of the Court of Appeals, there was only one such plea that had any merit in it, is it competent for that court to correct that mistake? In the view of the counsel for the city in that case this was only one of the many errors committed by the Circuit Court in that decree, and they adopted the only means known to the law for correcting them, which was appeal to this court, and on their failure to secure reversal they again urged the same, and other grounds, by petition for rehearing, all without avail.

But counsel for the city assert that they now have a better case, in that they have newly-discovered evidence upon the vital point, namely, the reversal of the judgment of February, 1896, and upon that evidence, presented in another case and in a different court, the Court of Appeals has practically annulled the judgment of the highest court in the nation.

It would be but reasonable to expect that the Court of Appeals in rendering an opinion of such far-reaching import ance, would have referred to some adjudged case in support of its position, especially when the contrary view was claimed to be upheld by a great number of cases which were cited and relied on by the bank, but not a single case is mentioned as bearing upon the point in controversy, while the authorities cited by the bank are entirely ignored.

The minority opinion delivered by Judge O'Rear, Judges DuRelle and Burnam uniting, states the controlling question in this case very clearly, as follows:

"Does the judgment of the United States Circuit Court of June, 1898, in the action of the Deposit Bank of Frankfort vs. Sam'l H. Stone *et al*, decide necessarily the matter involved in this suit? If it does, the parties to this suit having been parties to that, the judgment being unreversed, and yet in force, it is a bar to this suit by appellant." (R. 179.)

It is presented again in that opinion thus:

"I apprehend that the question presented here by the plea of *res adjudicata* is not *what* the court ought to have decided, nor as to whether its decision was supported by the facts or in law, but *did it decide the question now involved?*"

We do not think it would be necessary, even if we were able to do so, to add anything to the very able argument in that opinion (which for convenience of the court we have copied in full in the appendix to this brief), but will content ourselves with calling the court's attention to a few of the many authorities in support of our view.

In Freeman on Judgments, section 485, page 852, the rule is thus stated:

"As between National and State Courts, neither will undertake to grant relief from a judgment of the other, one having equitable grounds for relief from a judgment rendered in courts of either must apply to the courts of the sovereignty in which the judgment was rendered."
Citing Riggs vs. Johnson & Co., 6 Wall, 166.
U. S. vs. Keokuk, 6 Wall. 514.
Engles vs. Miller, 2 Ruh. Eq. 320.

Strozen vs. Hawes, 30 Ga. 578.
U. S. Statute at large, 335.

In the action of Hollister vs. Abbott, 64 Am. Dec. 342 we find the following language:

> "It is a well-established principle that a judgment of a court of record having jurisdiction of the cause and of the parties, is binding and conclusive upon the parties and privies in every other court until it is regularly reversed by some court having jurisdiction for that purpose. Notwithstanding the proceedings may be erroneous, yet, as between parties the judgment must stand until regularly vacated or reversed. Where a court has jurisdiction it has a right to decide every question which arises in the cause, and whether its decision be correct or otherwise, its judgment until reversed is regarded as binding in every other court. In no collateral way can the parties question the correctness of a judgment which has been rendered between them in a court having jurisdiction of them and of the subject-matter. The only way for them to investigate such a judgment is by a rehearing of that case, either on writ of error or by some other legal or direct mode. For to the extent to which the judgment goes their rights have been considered and decided, and they have submitted to that decision either from the course of law after a final hearing by the court of last resort, or from a disinclination to pursue the matter further when other courses of proceeding for rehearing were open before them and might have been had if they so elected."

And upon the authority of the case the Memphis, etc., R. Co. vs. Grayson (Ala.) 7 S. Hep., 122, and several other

cases cited, the rule is thus stated in the Am. and Eng. Ency. of Law, volume 12, page 1490:

> "The judgment of a sister State may be plead in bar to an action between the same parties on the original claim, although the latter action was begun before the action in which the judgment was pending."

This question of the conclusiveness of a judgment of a court of competent jurisdiction was under review in the case of Dupuy vs. Johnson, 4 Bibb, 562, and the court in that case said:

> "That a judgment or decree pronounced by a court having competent jurisdiction of the case is binding until it is reversed by a court of appellate jurisdiction, and that it never can be overruled or its correctness questioned in an original suit is a doctrine founded upon principles too solid to be shaken, and too obvious to require discussion. The contrary doctrine would involve the monstrous absurdity of making litigation endless and rendering every decision fruitless and unavailing."

In Garner's Adm'r vs. Strode, 5 Littell, 314, the question was whether a chancellor, on a proper issue made for that purpose, could correct the decree of a former term wrongfully entered, either through fraud or mistake, and could relieve against their consequences, and the court, through Judge Mills considering that proposition, said:

> "Whether the evidence and facts proved in the cause would be sufficient to correct this decree and change it from a decree on the merits to a simple dismission, without hearing, on a proper application by petition or bill of

review, we need not now determine, because the question is not presented to us in that shape, but we lay it down as a general rule that if such correction does ever take place it must be by a direct proceeding in that cause in which its record is made right, and that the matter which may be then held sufficient to change or correct can not be held good as an avoidance in another case. If the relief could be thus granted both records would be complete, one presenting a decree against, and the other for, the complainant on the same merits, which is absurd. To avoid the effect of a decree in another cause where its merits are collaterally brought into question can not be permitted. The first record must be first changed, and then its collateral operation will not be injurious. However strong the equity of the appellant may be, the bar must operate while it exists unaltered and unreversed."

The case of Paul, etc. vs. Smith, etc., 82 Ky. 431, was an ejectment for land, and the defense rested upon the validity of the title derived through a decretal sale, and the court said:

"The success or defeat of the appellants in this action depends on whether the Henry Circuit Court had jurisdiction to render said judgment, because it may be regarded as a legal maxim that when a judgment is offered in evidence collaterally in another suit, its validity can not be questioned except for want of jurisdiction in the court that rendered it."

To the same effect is Freeman on Judgments, volume 1, page 444:

"Nor is the effect of a judgment as *res judicata* lessened when the fact that it is erroneous is established by

the decision of the highest appellate tribunal in the State, rendered in another action. The law of the case seems not only to govern the action in its subsequent stages, but to control other actions between the same parties relating to the same subject-matter or transaction. Thus where several installments of money were due on a contract, and the court decided that it was such a contract that an action could be sustained for one installment without impairing the right to subsequently sue for another installment due when the first action was brought, it was held that the parties were estopped in a third action from contending that the decision in the prior action was erroneous, and that a judgment for any one installment merged others due when the action was brought. So where the character and effect of a writing is settled by the judgment of a court of competent jurisdiction it can not be shown in another action between the same parties that it ought to be given a different effect." * * *

Page 521, Sec. 284a:

"Defenses and causes of action once presented and considered cannot be again asserted in another suit, without a violation of the principles of *res judicata*. But the obstinacy with which litigants press their claims upon the attention of courts is such that it is not uncommon for matters once fully determined to be again made, or at least attempted to be made, the subjects of judicial inquiry. Sometimes the circumstances attending a former decision are such as to render the application of the law *res judicata*, apparently a matter of great injustice. * * * Generally, however, such is not the

case; and the instances are comparatively few in which any cause of action or any matter of defense is allowed to prevail where it is inconsistent with the facts necessary to uphold any previous adjudication between the same parties." * * *

Also Sec. 248, volume 1, page 439:

"There is nothing unjust or inequitable in insisting upon an estoppel by a judgment upon the same point; on the contrary, the rule is a beneficial one, and it is a matter in which the public is said to have an interest as well as the parties that there should be an end of litigation."

Citing San Francisco, etc., 52 N. W. 39 Cal. 473.

The exact point contended for in this case by the plaintiff in error was decided in Parkhurst vs. Berdell, 110 New York Reports, 384. In that case a judgment of the trial court was rendered, fixing certain rights between the parties to it, from which judgment an appeal was taken. But, in the meantime, another action was brought between the same parties in part, upon the same subject-matter, and the former judgment was relied on as an estoppel to the extent it related to the matters in controversy in the last suit, and the last suit proceeded to judgment with that estopped plead as evidence, and a judgment was rendered upon it. In the meantime, the first suit was heard by the appellate court and reversed, and the second suit came on to be heard in the same Court, and the reversal of the judgment in the first suit was relied on to avoid the operation of the estoppel, and the court held:

"If the judgment roll was competent evidence when received, its reception was not rendered erroneous by a

subsequent reversal of the judgment. Notwithstanding its reversal, it continued in this action to have the same effect to which it was entitled when received in evidence. The only relief a party against whom a judgment which has been subsequently reversed has thus been received in evidence can have, is to move on that fact in the court of original jurisdiction for a new trial, and then the court can, in the exercise of its discretion, grant or refuse a new trial, as justice may require."

So in the case at bar, counsel for the city, instead of pressing for a trial after the reversal of the judgment of February, 1896, should have applied to this court for leave to file a bill of review in the Circuit Court of the United States to open up the decree, as indeed they afterwards did. In no other way could they bring the reversal to the attention of the State court, by way of avoidance of the bar presented by the decree, than by such bill of review. And, although the fact does not appear in the record of this particular case, it is part of the history of this litigation that in January, 1902, the city did apply to this court for leave to apply to the Circuit Court to file a bill of review, upon the ground of that reversal, which leave was granted by this court, but that court refused to allow the bill to be filed.

We respectfully ask a reversal.

D. W. LINDSEY,
FRANK CHINN,
Counsel for Plaintiff in Error.

APPENDIX.

"CHAPTER 28.

"AN ACT to repeal certain State bank charters.

"Whereas, By virtue of a recent decision of the Supreme Court of the United States, all banks of this State, both State and National, are now required to pay State and local taxes in Kentucky, except the Bank of Kentucky, the Farmers Bank of Kentucky and the Deposit Bank of Frankfort, which three last-named banks, by virtue of said decision, are now claiming exemption from all State and local taxes, except as provided in the Hewitt law, during their corporate existence; therefore,

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Section 1. That an act, entitled 'An act to establish the Bank of Kentucky,' approved February sixteenth, eighteen hundred and thirty-four, and all amendments and extensions thereof, also an act, entitled 'An act to incorporate the Farmers Bank of Kentucky,' approved February sixteenth, eighteen hundred and fifty, and all amendments and extensions thereof, also an act, entitled 'An act to incorporate the Deposit Bank of Frankfort,' approved March third, eighteen hundred and sixty-three, and all amendments and extensions thereof, be, and the same are hereby, repealed: Provided, That if said banks or either of them, on or before May first, nineteen hundred, file in Secretary of State's office their or its written consent to pay taxes under State and local levies of nineteen hundred and subsequent years, as provided in the Constitution and revenue statutes of this

State, the bank or banks thus agreeing shall be excepted from the operation of this act.

"Sec. 2. All acts and parts of acts in conflict herewith are hereby repealed.

"Sec. 3. Whereas, it is important that all banks of this State should be placed upon the same footing as to taxation without delay, an emergency exists, and this act shall take effect and be in force from and after its passage."

DISSENTING OPINION.

"Court of Appeals of Kentucky, January 15, 1902.

"BOARD OF COUNCILMEN OF CITY OF "FRANKFORT, . . . *Appellant.*	
vs.	Appeal from Franklin Circuit Court.
"DEPOSIT BANK OF FRANKFORT, *Appellee.*	

"Dissenting opinion by Judge O'Rear.

"To my mind the controlling question in this case is: Does the judgment of the United States Circuit Court of June, 1898, in the action of the Deposit Bank of Frankfort vs. Samuel H. Stone et al, decide necessarily the matter involved in this suit? If it does, the parties to this suit having been parties to that, the judgment being unreversed, and yet in force, it is a bar to this suit by appellant.

"Here appellant seeks to recover of appellee bank certain taxes under the existing revenue law. Appellee in the former action in the United States court claimed and that court decided that it had such a contract with the State of Kentucky, by having accepted the provisions of what was known as the 'Hewitt law,' that it could not

without its consent be taxed otherwise than as provided by that law—which did not admit of the taxation now sought to be enforced. In the suit in the Federal court taxes for the years 1895, 1896, 1897 and 1898, 'and any subsequent years,' seems to have been put directly in issue. The court's judgment, though, goes beyond the mere adjudication of the right to collect the municipal tax for those years 'and subsequent years.' The court adjudged:

"'It is further adjudged, ordered and decreed that by reason of the several pleas of *res adjudicata*, relied on by the complainant in its bill and as shown by the exhibits therewith, the complainant has established a contract with the Commonwealth of Kentucky under the provisions of article 2 of the act of the General Assembly of the State of Kentucky, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1896, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth can not alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock can not, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of the Commonwealth of Kentucky and the act of November 11, 1892, so far as they are intended to provide, or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by sections 1, 2 and 3 of article 2 of said act

approved May 17, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void."

"It is said in the majority opinion that as the decision of the Federal court was based upon a judgment then in force in the State court, but subsequently reversed, the United States Court probably would not have decided the case as it did if the State court judgment had not then been in force. I apprehend that the question presented here by the plea of *res adjudicata* is not what the court ought to have decided, nor as to whether its decision was supported by the facts or in law; but *did it decide the question now involved?* From the language quoted from its judgment, I think it did. That judgment distinctly and unequivocally declared the acceptance of the Hewitt law by appellee was an irrevocable contract.

"It enjoined the city from attempting to collect any tax upon appellee's shares of stock, except in the manner and to the extent provided in the Hewitt bill. If we were at liberty to disregard the fact that was adjudicated, and in this collateral attack look merely to the basis or reason for the decision, we would at once have to determine, upon any plea of *res adjudicata*, the merits of the original controversy. This, of course, could not be allowed. To do so would be to abandon at once the whole doctrine of *res adjudicata*—one of the most necessary branches of the law of estoppel.

"The temptation is often strong, in a case of peculiar merit, to abandon, or at least to lay aside, the doctrine. Sometimes its very harshness repels the instinctive sense of justice. Yet upon a careful reconsideration of the reasons underlying it, and especially of the interminable confusion and uncertainty that must result in the con-

flicts inevitable upon its abandonment, I believe a safer course lies in its uniform, strict observance.

"This court has from a very early date, and with entire consistency until this decision, subscribed to the efficacy of the doctrine as generally applied by common-law courts.

"In Garner's Adm'r vs. Strode, 5 Litt. 314, where the judgment collaterally attacked was rendered by the court in which the plea against the attack was made, it was said:

"'To avoid the effect of a decree in another cause, where its merits are collaterally brought into question, can not be permitted. The first record must be first changed, and then its collateral operation will not be injurious. However strong the equity of the appellant may be, the bar must operate while it exists, unaltered and unreversed.'

"In the earlier case of Dupuy vs. Johnson, 1 Bibb, 565 (1809) by Judge Boyle, this court held:

"'That a judgment or decree pronounced by a court having competent jurisdiction of the case is binding until it is reversed by a court of appellate jurisdiction, and that it can never be overhauled, or its correctness questioned in an original suit, is a doctrine founded upon principles too solid to be shaken, and too obvious to require discussion. The contrary doctrine would involve the monstrous absurdity of making litigation endless, and rendering every decision fruitless and unavailing.'

"As late as Paul vs. Smith, 82 Ky. 451, this view has been sustained. So far as I know it has never before been questioned by the court.

"For these reasons alone the judgment below should have been affirmed.

"Judges DuRelle and Burnam concur in this dissent."